No. 14702

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

FREDERICK I. RICHMAN,

Appellant and Cross-Appellee,

vs.

LYDA TIDWELL,

Appellee and Cross-Appellant,

ROY E. HALLBERG, as Receiver, and FITZPATRICK & WHYTE and JOHN WHYTE, attorneys for the Receiver,

Appellees.

Consolidated Brief of Lyda Tidwell as Cross-Appellant and as Appellee, in Answer to Opening Brief of Appellant Frederick I. Richman.

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Preliminary Comment.

It should be noted that since Lyda Tidwell, plaintiff in the court below, appealed only from a relatively small portion of the court's order [see Notice of Appeal, R. 197, and Lyda Tidwell's Statement of Points, R. 972], it was felt that it would be practical for Lyda Tidwell, as cross-appellant and respondent, to file only one brief, which would constitute both a cross-appellant's opening brief and a respondent's reply brief.

An order permitting this consolidation was obtained from the United States Court of Appeals for the Ninth Circuit, based upon the Stipulation of the parties.

Therefore, Lyda Tidwell's Brief is divided into two portions, the first portion constituting her opening brief as Cross-Appellant, and the second portion, her reply as respondent.

In view of the fact that there are two separate appeals filed, cross-appellant and respondent, Lyda Tidwell, will, for convenience, be generally referred to by her name solely, and appellant and cross-respondent, Frederick I. Richman, will be, for convenience, referred to by his name solely.

OPENING BRIEF OF CROSS-APPELLANT, LYDA TIDWELL.

Pleadings and Jurisdiction.

This case originally arose out of an action brought by Lyda Tidwell, as plaintiff, against her brother, Frederick I. Richman, and others, as defendants, in the United States District Court for the Southern District of California. Plaintiff, Lyda Tidwell, brought suit seeking the dissolution and avoidance of a Declaration of an *inter vivos* Trust, and for a distribution of the assets of the estate to the trustors, consisting of herself and her brother, Frederick I. Richman. Each was the beneficial owner of one-half the assets of said trust. She claimed that the trust was voidable because of undue influence and fraud in the inception of the trust and sought damages for fraudulent and improper management, and further asked for the removal of Frederick I. Richman as agent of the trust. Defendant, Frederick I. Richman, answered, denying the allegations of undue influence and fraud in the inception of the trust and further denied the allegations of fraudulent and improper management. [See Memorandum of Decision, R. 3-20.]

Jurisdiction is based on the fact that plaintiff, Lyda Tidwell, is a resident of the State of New Mexico, while defendant, Frederick I. Richman, and the remaining defendants are residents of the State of California, and the amount involved in the controversy exceeded $3,000.00 exclusive of costs and interest.

Jurisdiction is conferred under the provisions of Section 1291 of the Judicial Code as amended (28 U. S. C. 1291).

Statement of the Case.

The trial court determined that the issues of fraud and undue influence in the inception of the trust would be tried first and separately from the other remaining issues under the provisions of section 42(b) of the Rules of Civil Procedure for the District Courts of the United States. [R. 3-4.] After an extended and bitterly contested trial, which lasted in excess of nineteen (19) days [R. 5], the trial court filed its Memorandum of Decision on November 30, 1953 [R. 3-20], in favor of Lyda Tidwell voiding and cancelling the trust and all other questions and matters were expressly reserved for further proceedings. [R. 17.]

On the same day, November 30, 1953, the trial court signed and filed its order appointing Roy E. Hallberg as Receiver, "In the best interests of all the parties and for the protection and preservation of the assets of the former Richman Trust" [R. 21-24], said receiver being expressly ordered to take possession forthwith of the said assets and manage and operate the same, and that the said receiver should not pay any income to either plaintiff or defendant Richman without specific order of court. The principal assets consisted of the five apartment houses mentioned in the court's order. [R. 22.]

Judgment was entered January 22, 1954, in favor of Lyda Tidwell voiding the trust, and in conformance with the memorandum decision of November 30, 1953, and on the express finding that no just reason for delay existed in the entering of judgment. [R. 21-24.]

The receiver operated the former trust properties for a period of three months, from December 1, 1953, to February 28, 1954, at which time plaintiff, Lyda Tidwell, and defendant Richman reached a final settlement disposing of all issues. Said settlement arose by virtue of a letter dated February 19, 1954, in which defendant offered to sell his undivided one-half interest in the former trust assets to plaintiff for the sum of $600,000.00; that plaintiff, Tidwell, as the buyer, would assume possession of the said assets on February 28, 1954, and after payment of or provisions being made for the payment of the receiver's operating obligations and expenses and fees, the balance remaining under the control of court would be divided equally between the parties. [R. 139-142.] Plaintiff Tidwell unconditionally accepted said offer by letter dated February 25, 1954, and assumed possession of the assets on February 28, 1954. [R. 143-144.]

The Receiver filed his First and Final Report and Petition for Allowance of Fee to Receiver, on March 18, 1954 [R. 75-121], and on the same day, Fitzpatrick & Whyte, and John Whyte, attorneys for the receiver, filed their Petition for Allowance of Fees to Attorneys for Receiver. [R. 58-74.] Said receiver's First and Final Account reflected that he had on hand, after the payment of all obligations except his fees and those of his attorneys, the sum of $20,697.71. [R. 119.] On April 6, 1954, defendant Frederick I. Richman, filed his Objections and Answer to report and petition of receiver and his attorney for fees [R. 125-144], in which certain objections were made, first, to the account of the receiver, and, second, to surcharge the receiver for delivering certain assets to plaintiff Tidwell, in which assets Richman claimed to own a one-half undivided interest. On April 7, 1954, Lyda Tidwell filed her objections, stating that she, in fact, did

not object to the accuracy of the receiver's report, but merely pointed out that the trial court would be involved in a division of funds between Lyda Tidwell and Frederick I. Richman, in accordance with the letter agreement of the parties. [R. 145-152.] Lyda Tidwell then filed, on April 12, 1954, her Reply to Objections of Defendant, Frederick I. Richman [R. 152-156], together with points and authorities in support thereof. [R. 152-156.]

The said petition of the Receiver and his attorneys, and the objections of Tidwell and Richman are the pleadings pertaining to the present conflict between the receiver and his attorney on the one hand, and Frederick I. Richman, on the other, and also to the conflict between Lyda Tidwell and Frederick I. Richman as to the division of the fund remaining after payment therefrom of the fees for the receiver and his attorneys. Lyda Tidwell has never objected to the accuracy of the receiver's report nor to the award of reasonable fees to the receiver and his attorney, nor has she asked that the receiver be surcharged, since the receiver did no wrong, and the balance remaining in his hands is sufficient to settle in full all remaining disputes between Tidwell and Richman as to credits and debits, which each claims against the other in the final settlement of their dispute and division of the funds.

The trial court held its hearing, first, on the Receiver's Account and Report and the issues of an award of reasonable fees for the receiver and his attorneys. On June 21, 1954, stipulations were entered into between Lyda Tidwell and Frederick I. Richman, which made a trial of fact unnecessary as to the proper division of funds between them. [R. 783-817.] On October 5, 1954, a memorandum to counsel by the trial court disposed of all remaining issues and counsel for plaintiff was requested to pre-

pare an order under Local Rule 7 of the United States District Court for the Southern District of California, which rule permits the parties to submit computations based on the court's decision prior to the court signing a final order. Defendant Richman made no objection to the tentative order proposed by Lyda Tidwell, but seeks relief, by direct appeal, from the whole of said order finally signed and entered November 19, 1954. [R. 196.]

The defendant, Frederick I. Richman, having appealed from the whole of said order, plaintiff, Lyda Tidwell, appealed from that portion of the order relating to her dispute with the defendant, and which portion of the Order is unfavorable to her insofar as final division of funds under the court's control is concerned. [R. 197.]

Defendant Richman appealed on December 15, 1954 [R. 196], and plaintiff, Lyda Tidwell, appealed on December 20, 1954.

Generally, defendant Richman claims that (1) the trial court should have disqualified itself from considering any of the issues presented here; (2) that, in any event, the trial court had no jurisdiction to settle title as between plaintiff and defendant to the funds under the court's control; (3) that the receiver and his attorney were awarded excessive fees by the court; and (4) that, in dividing the fund between plaintiff and defendant: (a) the trial court should have given Richman a credit for services rendered the trust in November, 1953, at the rate of 10% of the gross receipts for that month, rather than at a *quantum meruit* rate of 6% allowed by the court; (b) that although the trial court allowed a credit in favor of Mr. Richman, for a trust deed payment made in February, 1954, by the receiver, which applied to the month of March, 1954, and was, therefore, the sole obligation of

Mrs. Tidwell, still the trial court erred in its computation; (c) that the trial court erred in failing to credit Richman with one-half of the rents collected from the trust department houses for the 26th, 27th and 28th days of February, 1954, which funds were turned over to Mrs. Tidwell by the receiver; (d) that the trial court erred in failing to credit Mr. Richman with one-half of the amount of petty cash fund which the receiver turned over to Mrs. Tidwell; that, although the receiver had not paid certain obligations incurred during his stewardship, which were later paid for by Mrs. Tidwell out of her own funds, nevertheless the court erred in allowing Mrs. Tidwell a credit for one-half of these obligations consisting of (e) the installation of catalytic units, (f) real property taxes for January and February, 1954, and (g) utility bills for February, 1954.

Plaintiff Tidwell on the other hand objected to (1) any award of agent's fees to Richman for the month of November, 1953, and (2) further claimed that in the final settlement between Richman and Tidwell, the court should have allowed her a credit for Richman's escrow fees and Bureau of Internal Revenue stamps required to be placed on Richman's deed of conveyance to her of his one-half undivided interest in the real properties of the former trust, since Mrs. Tidwell paid for those two items out of her own funds.

Specifications of Error.

Lyda Tidwell, as Cross-appellant, urges and relies upon three specifications of error, as follows:

(1) Specification of Error No. 1.

The trial court erred in awarding Richman a management fee as agent for the dissolved trust for the month of

November, 1953, in the sum of $1,862.60 (one-half of which was charged to Lyda Tidwell) or in any sum whatsoever.

(a) The court found that Richman was entitled to a reasonable fee for services rendered by him as agent of the dissolved trust for the month of November, 1953, which reasonable fee was found to be 6% of gross revenues or the sum of $1,862.60, one-half of which was held to be the obligation of plaintiff, Lyda Tidwell. [R. 194-195.]

(2) Specification of Error No. 2.

The trial court erred in failing to credit Lyda Tidwell from Richman's share of the balance of the funds for Richman's escrow fees on the sale of his one-half undivided interest of the trust assets. Lyda Tidwell paid the seller's escrow fees in the sum of $329.00. [R. 787-788; 799A.] The trial court found that Lyda Tidwell was not entitled to any credits for expenses incurred by her in said escrow on behalf of Richman. [R. 195-196.]

(3) Specification of Error No. 3.

The trial court erred in failing to credit Lyda Tidwell from Richman's share of the balance of the funds for Richman's costs for Bureau of Internal Revenue Stamps placed on his deed of conveyance of his one-half undivided interest in the former trust properties. Lyda Tidwell paid the sum of $577.50 for the said Internal Revenue stamps out of her own funds. [R. 799A.] The trial court found that Lyda Tidwell was not entitled to any credits for payments made by her on Richman's behalf in said escrow. [R. 195-196.]

I.

Specification of Error No. 1.

Richman Not Entitled to Credit for Any Services Rendered the Trust.

Lyda Tidwell assigns error to the trial court's granting a credit to Frederick I. Richman in the sum of $1,862.60 out of the balance of the fund for services rendered to the trust as agent therefor for the month of November, 1953.

In his brief at page 67, Richman even claims that he is entitled to his full agent's fee of ten per cent (10%) for the operation of the trust in November, 1953. The court did, in fact, give him credit for one-half of a reasonable fee, which the trial court set at six per cent (6%). [R. 194-195.]

Mrs. Tidwell strongly urges that Mr. Richman was not entitled to any credit for fees.

Before arguing the respective alleged specifications of error, a brief review of the pertinent evidence may help clarify these issues:

The parties had reached a binding agreement by the unqualified acceptance letter of Tidwell and her attorneys dated February 25, 1954. [R. 143.]

The pertinent provisions of the offer letter dated February 19, 1954, written by Richman's attorneys and approved by him in writing at the bottom thereof [R. 139-142] are as follows:

> (1) Mutual releases by each party to the other from the beginning of time to the present.
>
> (2) Both parties to "bear their own expenses."
>
> (3) Mutual dismissals with prejudice to be entered in the law suit.

(4) "A stipulation shall be entered into that the receiver be relieved as of five o'clock p. m. February 28, 1954, and whoever buys shall be entitled to all receipts and shall assume all operating obligations of the Richman Trust from March 1, 1954 on . . ."

(5) "The receiver shall file his report and after the payment and/or provision for all of the receiver's claims and expenses and operating obligations of Richman Trust to February 28, 1954, any funds remaining shall be divided equally between Mrs. Tidwell and Mr. Richman."

(6) "Mrs. Tidwell shall have her election to either buy Mr. Richman's undivided half interest in the assets of Richman Trust, or to sell her undivided one-half interest in the assets of Richman Trust for the sum of $600,000.00, payable on the following basis:

"(a) $100,000.00 cash shall be paid on February 26, 1954 . . . to the other . . ."

"(b) $500,000.00 shall be paid through escrow . . . on or before May 1, 1954."

(7) "All parties will execute whatever is necessary to carry out the terms of this arrangement."

Lyda Tidwell, having accepted the offer of Richman to sell his "undivided half interest in the assets of the Richman Trust," Lyda Tidwell paid Richman the $100,000.00 directly and the parties went in to escrow and entered into an escrow agreement for the purpose of executing the contract of purchase. [Escrow Instructions, R. 799-800.]

It must be recalled that the court stated Richman "had adroitly, and by over-weaning and deceptive means, obtained a contract for a lifetime." [Memorandum Decision, R. 188.] As agent of the trust, Richman received a fee of 10% of the gross receipts (exclusive of capital gains). [R. 729-730.] This was a nice "fat" fee when

we realize that the 10% fee Richman seeks for the month of November, 1953, amounts to $3,104.33, and when we further realize that it was not by any means a full-time job, as shown by the receiver's testimony and by Richman's testimony as to his law practice and many other interests. [R. 528, 713-715, 731-732.] The court awarded the receiver a fee of 6% of the gross income for the period of the receivership [R. 183], and Richman has charged that the same is excessive and an abuse of discretion, although apparently the receiver did his job as well or better than Richman. The court states that ten (10) percent is an excessive fee [R. 187] and that a 5% fee "would have been indicated." [R. 183.] The court then awards Richman a fee amounting to 6% of gross revenues, or the sum of $1,862.60, of which Mrs. Tidwell must pay one-half. [R. 194-195.]

The trial court correctly pointed out in its memorandum decision that the trust had been voided and therefore Richman was not entitled to the amount provided for in said Trust Agreement. [R. 183.] The judgment did, of course, void and set aside and cancel the trust [R. 41-44], and the court was perfectly correct in holding that it was not bound by the terms of the Trust in setting a fee for Mr. Richman. Satisfaction of judgment was entered in said case [R. 800], and the judgment voiding the trust therefore became final.

However, Mrs. Tidwell objects to the award of any fees to Mr. Richman for the month of November, 1953. It must be noted that the Trust began November 1, 1945, and that Richman, as agent, had received approximately twice the amount of fees to which he was reasonably entitled for a period of almost exactly eight years. [R. 187.] Mrs. Tidwell had been mulcted of thousands of

dollars in fees. These issues (other than fraud and undue influence in the execution of the trust) had not been tried when the court gave its judgment voiding the Trust. [R. 3-4.] The judgment specifically reserved to Mrs. Tidwell the right to claim "such additional assets, if any, as plaintiff (Mrs. Tidwell) may be adjudged entitled to after an accounting; . . ." and the court reserved jurisdiction to make final disposition of "other issues still pending. . . ." [R. 43-44.]

Mrs. Tidwell had a legitimate claim for the surcharging of Mr. Richman with respect to excessive fees charged her in the past. But when the settlement was made, each party, as a term of the letter agreement, released the other from any and all claims from the beginning of time to the present. Also, the letter offer of February 19, 1954, states: "2. Both parties shall bear their own expenses." [R. 140.]

At the time the parties entered into the letter agreement, the trust was voided. Richman's claim for reasonable fees for services rendered could, of course, only be made against Mrs. Tidwell and himself, because his services, as agent, were only of benefit to them as the owners of the trust properties. The judgment, therefore, left Richman in the position of a claimant against Mrs. Tidwell for the reasonable value of his services. But, Mrs. Tidwell had many claims against Mr. Richman. Both parties gave up these claims.

Mr. Richman's offer, must be most strictly construed against him in the event of ambiguity, since he and his attorney are the author thereof, and said offer makes no mention of his receiving this fee. The letter offer of February 19th mentions paying "the receiver's claims and expenses and operating obligations" [R. 141], but doesn't

mention paying any of Richman's claims. It would be adding insult to injury to award Richman one cent more in fees in this case. It certainly was not the intent of the parties that he be so enriched. Mr. Richman testified several times that the net worth of the trust was $1,200,000. If that be true, then plaintiff, in paying $600,000 for Mr. Richman's interest, was in no way compensated for the loss she sustained over a period of eight years in the payment of exorbitant fees. Looking at the letter agreement as a whole, it is obvious that each party must bear any expenses sustained in connection with the trust. Any services which Richman performed and was not compensated for, was his "own expense."

The letter offer of February 19, 1954, was prepared and signed by both Mr. Richman and his attorney and must be most strictly construed against him.

Williston On Contracts, Revised Edition, Volume 1, Section 37, Page 100, states as follows:

> "* * * (a) Ambiguous words in an obligation should be interpreted most strongly against the party who used them."

And again in Volume 3 of Williston, *supra,* Section 620, Page 1788:

> "Since one who speaks or writes, can by exactness of expression more exactly prevent mistakes in meaning, than one with whom he is dealing, doubts arising from ambiguity of language are resolved in favor of the latter;"

See *Restatement of Contracts,* Section 236(d). Also in accord, *Preston v. Herminghaus,* 211 Cal. 1; *Couture v. Ocean Park Bk.,* 205 Cal. 338.

II.

Specification of Errors 2 and 3.

Lyda Tidwell Entitled to Credit for Escrow Fees and Revenue Stamps Paid by Her on Behalf of Richman.

Lyda Tidwell assigns error to the trial court's failure to grant her credit out of the balance of the fund for escrow fees in the sum of $329.00 and revenue stamps in the amount of $577.50 paid by her on behalf of Richman in the escrow held at the California Bank for the purpose of executing the letter agreement.

In order to distribute the money which the court had under its control, it became necessary for it to interpret the letter agreement of the parties, the escrow instructions, and other evidence submitted to it.

When the parties appeared at escrow, Richman insisted that the escrow instructions provide that the buyer (Mrs. Tidwell) pay the seller's as well as the buyer's escrow fees and that the buyer pay for the Internal Revenue Stamps to be placed on the deed of conveyance. The escrow company is hardly the place to argue such points. Thus, the escrow instructions provide for payment of those two items by the buyer [799A]. However, immediately after such provisions appears the following:

> "These instructions are not intended to and do not amend, alter, modify or supersede any agreement outside of escrow between F. I. Richman and me and with which agreement California Bank is not to be concerned." [R. 799A.]

In spite of the last quoted portion of the escrow instructions, Richman argues that the escrow instructions control over the letter agreement. He further states that the letter

agreement means that the person selling is to "net" the sum of $600,000, and therefore, the buyer is to pay all expenses incident to the sale. Agreements for the sale of property always provide that a purchaser shall pay a certain sum of money as and for the purchase price and deposit a portion thereof in escrow or pay the same outside of escrow directly to the seller for the purpose of binding the agreement. Yet the seller always expects to pay his share of the escrow expenses and all the seller's costs of sale.

And, further, the letter agreement specifically states that:

> "Both parties shall bear their own expenses." [R. 140.]

Furthermore, although the subjects of payment of escrow fees and revenue stamps were not specifically mentioned in the letter agreement, still the usual practice and custom with respect to the same were an integral part of the letter agreement. It was said in *King v. Stanley,* 32 Cal. 2d 584, 197 P. 2d 321, that:

> "Equity does not require that all the terms and conditions of the proposed agreement be set forth in the contract. The usual and reasonable conditions of such a contract are, in the contemplation of the parties, a part of their agreement. In the absence of express conditions, custom determines incidental matters relating to the opening of an escrow, *furnishing deeds,* title insurance policies, prorating of taxes, and the like. (Janssen v. Davis, 219 Cal. 783, 788

(29 P. 2d 196); Wagner v. Eustathiev, 169 Cal. 663, 666 (147 P. 561); Bisno v. Herzbery, 75 C. A. (2d) 235, 241 (170 P. 2d 973); O'Donnell v. Luther, 68 Cal. App. 2d 376, 383 (156 P. 2d 958).)" (Italics ours.) (Pp. 588-589.)

Therefore, the letter agreement actually provided that the seller (Richman) would pay his share of the escrow fees and the revenue stamps on the deed of conveyance which are the seller's usual expenses.

In the case of *King v. Stanley, supra,* the seller argued that the escrow instructions pertaining to her furnishing a policy of title insurance added a provision not contained in the original agreement. But the court held that it was implied in the original agreement (by custom) that she should furnish a policy of title insurance.

Clearly, there can be no doubt as to the meaning of the offer of February 19, 1954, with respect to the responsibility for the seller's escrow fees and internal revenue stamps. There is no ambiguity involved here as to this issue. Richman apparently argues that the escrow instructions superseded the original contract of purchase, and that the seller's escrow fees and internal revenue stamps should not be paid by him because the escrow instructions specifically state that the buyer shall pay the same. [R. 800.]

The importance of the escrow was to make possible the execution of the contract of purchase. Lyda Tidwell had no desire to indulge in protracted argument over the

wording of escrow instructions. Both parties were protected by the typewritten insertion of the following words:

> *"These instructions are not intended to and do not amend, alter, modify or supersede any agreement outside of escrow between F. I. Richman and me (Lyda Tidwell) and with which agreement California Bank is not to be concerned."* [R. 799A.]

In other words, in this particular case, the parties agreed, that the contract of purchase as arrived at by the interchange of the letters of February 19, 1954 and February 25, 1954, was not to be in any manner affected by the signing of escrow instructions.

It very often happens that parties may enter into an involved agreement of purchase and sale and then go into escrow and file escrow instructions. If the escrow instructions are inconsistent with the prior written agreement, the question arises as to which is to control. This is a question of interpretation and the prior agreement and the escrow instructions must be read together. If the escrow instructions specifically state that the prior agreement is the controlling one, then, of course, the prior agreement controls and not the escrow instructions. In *King v. Stanley, supra,* the court stated that escrow instructions which are merely customary and expected directions to the escrow company do not take the place of the prior written agreement but merely carry it into effect.

In *Pigg v. Kelley,* 92 Cal. App. 329, 268 Pac. 463, it was held that where a written agreement of sale and escrow instructions connected therewith show by their

terms that they refer to the same sale, the two instruments must be construed together, under Civil Code 1642, to ascertain the whole contract between the parties.

In *Womble v. Wilbur,* 3 Cal. App. 527, 86 Pac. 921, it was held that where parties entered into a written agreement and in pursuance thereof entered into an escrow whereby certain instructions were given to the escrow company, in case of any inconsistency, it is a question of interpretation of contracts and the surrounding circumstances as to whether the former agreement or the escrow instructions controlled. The court points out that the parties can agree that the previous written agreement is not to be superseded by any escrow instructions.

For the reasons hereinabove stated, it is respectfully submitted that the trial court erred in granting an agent's fee to Richman for the month of November, 1953, and in failing to surcharge Richman's share of the fund for his escrow fees in the sum of $329.00 and in the further sum of $577.50 for Internal Revenue Stamps, the latter two items having been paid by Mrs. Tidwell.

REPLY BRIEF OF APPELLEE LYDA TIDWELL.

Considerable time was expended in the trial of the Receiver's accounting and the issues pertaining to his fees and those of his attorney. Although counsel for Tidwell were in attendance at the trial, they made it clear to the court that they did not question these issues and all that remained to be done, insofar as the Receiver was concerned, was to award him a reasonable fee [R. 243] and the record shows that counsel for Lyda Tidwell did not participate in these issues.

Nowhere does the record show that the receiver failed to account properly for the funds received by him in the administration of the trust, nor does the record show that the receivership lost any money or that it failed to manage the apartment houses correctly.

The trial court permitted the receiver to reimburse himself for the sum of $89.20 for copies of depositions paid by him. [Order of Court, R. 195.] These were copies of the deposition of the receiver [R. 871-921] and his attorney. [R. 922-968.] Both of these depositions were taken by Joseph Enright and were used and introduced into evidence in the hearing between the receiver and Richman. Since the Order of the Court ordered the receiver to reimburse himself from the funds remaining in his hands, Lyda Tidwell paid one-half of those expenses. Tidwell believes that the receiver is entitled to be reimbursed for those expenses, but only out of Richman's share of the funds in the receiver's hands.

Likewise, with reference to costs on appeal, it is respectfully submitted that Lyda Tidwell should not be charged with any costs on appeal pertaining to the issues of the Receiver's account, his fees and the fees of his attorney.

I.

Court Had Jurisdiction to Determine Respective Rights of Lyda Tidwell and Frederick I. Richman to Balance of Funds in Receiver's Hands.

Under "Specification of Error 1" Richman argues in his opening brief that the trial court had no jurisdiction to settle the dispute between Richman and Tidwell as to the balance of the funds remaining in the Receiver's hands (Richman's Op. Br. pp. 49-54); however, he cites no authority for the proposition.

The trial court explains in its Order *In Re* Settlement of the Receiver's accounts that it retained jurisdiction, after the dismissal of Tidwell's suit against Richman, for the purposes of settling the accounts of the receiver, fixing the fees of the receiver and his attorney and disposing of any balance of the funds remaining. [R. 192.]

The trial court's procedure was undoubtedly correct.

In *Pacific Bank v. Madera Fruit, etc. Co.,* 124 Cal. 525, 57 Pac. 462, plaintiff dismissed suit after a receiver had been appointed and after the receiver had taken possession of certain assets. Thereafter, the receiver filed his account and petition and asked the court to "settle the same, fix his compensation, et cetera." Plaintiff then filed a motion to dismiss the account and petition on the ground that the court had lost jurisdiction. However, the motion was overruled and this ruling was affirmed on appeal. The decision of the court notes that not only does the court retain jurisdiction to settle the receiver's account, but it also retains jurisdiction to dispose of the funds in the receiver's possession, saying, the receiver,

> " '. . . is still amenable to the court as its officer until he has complied with its directions as to the disposal of the funds which he has received during the course of his receivership.' "

The *Pacific Bank* case also states, at page 527:

> "* * * If the court below lost jurisdiction of the case by virtue of the dismissal so that it could not settle the accounts of the receiver, *nor make any disposition of the funds in his hands, how would the account be settled or the funds disposed of?* The money on hand and collected by the receiver is in contemplation of law in the hands of the court to be disposed of as the law directs." (Emphasis ours.)

And,

> "If the court in which the receiver was appointed cannot, after the dismissal of the case, settle and adjust the accounts of the receiver, to what jurisdiction will he resort? The dismissal of the case was the end of it as between the parties, but *we think the court still retained the power to settle the accounts of its receiver and to direct the application of the funds in his hands.*" (P. 527.) (Emphasis ours.)

It is clear that the receiver is holding funds for disposal at the direction of the court. In *Garniss v. Superior Court,* 88 Cal. 413, 417, 26 Pac. 351, 417, the court stated, quoting from Beach on Receivers, Section 249:

> " 'Though a receiver may be, and generally is, appointed upon the application of one of the parties interested in the property which he is to preserve, his holding is not merely for the benefit of such party, or of any other party; *it is the holding of the court for the equal benefit of all persons who may be finally adjudged by the court to have rights in it.*' " (Emphasis ours.)

In *State v. Gibson,* 21 Ark. 140, the court, referring to jurisdiction over a receiver after dismissal of the case, said,

> "He was an officer of the court and subject to its orders in relation to the partnership effects placed

in his hands as receiver until discharged by the court."

To the same effect, see *Ireland v. Nichols,* 40 How. Pr. 85; *Whiteside v. Pendergast,* 2 Barb. Ch. 471.

II.

Reply to Richman's Specifications of Error 2, 3 and 4.

Under Richman's "Specifications of Error 2, 3, and 4" [R. 54-59] a number of points are apparently made, and will be discussed in the order raised by him.

A. Charging Receiver's Fund With Real Property Taxes for the Months of January and February, 1954.

The trial court found that the receiver, having turned over his records to Lyda Tidwell on February 28, 1954, did not pay certain obligations during his administration, and one of these was the real property taxes for the months of January and February, 1954, in the sum of $4,952.77 [R. 193] and the court held that Lyda Tidwell was entitled to a credit of one-half that amount, or $2,476.38. [R. 195.]

Clearly the agreement of the parties was that the "operating obligations" of the receivership up to February 28, 1954, would be borne by the parties equally. The offer letter of February 19, 1954, stated that the person buying would "assume all operating obligations of the Richman Trust from March 1, 1954 on . . ." And again the offer further stated that "after the payment and/or provision for all of the receiver's claims and expenses and operating obligations of the Richman Trust to February 28, 1954, any funds remaining shall be divided equally between Mrs. Tidwell and Mr. Richman."

The only question remaining is whether real property taxes constitute "operating obligations." There can be no question but that real property taxes are the very essence of "operating obligations" in a business devoted to the operation of apartment houses for profit. It has been specifically held that "operating obligations or expenses" include taxes.

Schmidt v. Louisville C & L Ry. Co., 84 S. W. 314, 315, 119 Ky. 287;

Michigan Public Utilities Com. v. Michigan State Telephone Co., 200 N. W. 749, 228 Mich. 658;

Fleischer v. Pelton Steel Co., 198 N. W. 444, 447, 183 Wis. 151.

Clearly, there can be no doubt as to the meaning of the offer of February 19, 1954, with respect to the responsibility for real property taxes up to February 28, 1954. Richman apparently argues that the escrow instructions superseded the original contract of purchase, and that the taxes should not be pro rated because the escrow instructions specifically state that taxes shall not be pro rated in escrow. [R. 800.]

But this overlooks the express provision in the escrow instructions to the effect that they shall not supersede, alter or amend the agreement between the parties.

The discussion hereinbefore had under paragraph II of the argument in the cross-appellant's portion of this brief discusses fully the effect of the escrow instructions and the same is incorporated herein at this point by reference.

Richman finally argues in connection with the taxes that there is no evidence to support the credit therefor in favor of Mrs. Tidwell. A pre-trial hearing was held on June 21, 1954. [R. 782-817.] Stipulations were

entered into with respect to all matters except as to the pro-ration of rents. Mr. Enright argued that if the court ruled as a matter of law there was to be no pro-ration of rents, then no factual issue would be left to try. [R. 809-812.] The trial court so understood also because the court states that the parties may file a stipulation on the February and March, 1954, rents. Then the court asks counsel,

> "Is there any element about which we have to take oral evidence?"

And Mr. Enright, counsel for Mr. Richman, replies:

> "None, in my opinion." [R. 792.]

Mr. Robert Powsner, of Martin, Hahn & Camusi, represented Mrs. Tidwell at the pre-trial hearing. He requested a stipulation as to the issues urged on behalf of Mrs. Tidwell. Mr. Powsner stated, among other things:

> "There are the real property taxes on the apartment houses, which Mrs. Tidwell paid out of her personal funds for the first six months of 1954. It is her contention that there should be a pro ration made, so that the first two months' worth of those taxes should be reimbursed to her out of the receiver's funds. That the first third would be $4,952.77." [R. 785.]

A few moments later Mr. Powsner stated:

> "For instance, if Mr. Enright will stipulate Mrs. Tidwell paid for the taxes, we don't have to introduce evidence she did so, and so on and so forth. And as to the utility bills, also." [R. 786-787.]
>
> "The court: What about that, Mr. Enright?
>
> Mr. Enright: So stipulated. He mentioned the taxes only." [R. 787.]

Several minutes later, the record reveals that Mr. Enright stated:

> "O. K. now, the amount of revenue stamps, I think, is the only remaining one." [R. 790.]

B. Utility Bills for Month of February, 1954, Were Properly Held to Be an Operating Obligation for That Month.

The court found that Lyda Tidwell was entitled to a credit from the balance of the funds in the receiver's hands for one-half of the amount of the February utility bills which she paid for personally after assuming possession of the apartment houses on February 28, 1954, at 5 p. m. One-half of the amount paid by her for said bills was found to be the sum of $938.75. [R. 195.]

It is difficult to understand why Mr. Richman should dispute this item. Certainly, utility bills for the apartment houses for the month of February, 1954, were "operating obligations" of the receivership. In the operation of apartment houses for profit, utilities are a necessary expense item and one of the most basic items of operation.

All the arguments above stated in favor of allowing a credit to Mrs. Tidwell for real property taxes apply equally as well to allowing her a credit for the utility bills.

If Mrs. Tidwell is denied this credit, then the offer letter of February 19, 1954, is meaningless. Also, in this instance. Richman may not use the escrow instructions to argue that the original letter agreement was in effect altered by the escrow instructions, since the latter specifically state that they are not intended to so alter or modify.

Basis of Proof in Support of Utility Bills.

Richman also argues that there was no evidence before the court to support the credit to Mrs. Tidwell for payment of the utility bills. Under the subject of real property taxes, above, there has already been quoted from the pre-trial hearing certain colloquies between court and counsel which demonstrate that the parties, as well as the trial court, assumed that the issues with respect to utility bills had been stipulated.

In addition, the following appears to have occurred at the June 21st pre-trial hearing:

> "Mr. Powsner: And will you stipulate Mrs. Tidwell (578) paid out of her personal funds charges for utilities for the five apartment houses for portions of February in the amount of $1,877.50.
>
> Mr. Enright: The amount, I am sure, is less than that amount. And if we can stipulate on all of the remaining, for the record. I may be willing to stipulate on that one, also.
>
> The Court: If you are not, it is the sort of matter that is susceptible of such easy proof that you can both probably check your figures.
>
> Mr. Powsner: I think you have five packets of utility bills.
>
> Mr. Enright: I will be willing to submit it on these five packets, if that is your proof.
>
> Mr. Powsner: I haven't looked at the packets.
>
> Mr. Enright: There they are (indicating). Mr. Camusi handed it to me.
>
> Mr. Powsner: That is correct.
>
> Mr. Enright: If that is your proof, I will stipulate they can go into evidence.
>
> Mr. Powsner: I will stipulate they go into evidence. I don't want to stipulate that is the entire

case for the utility bills. I understand in those bills it is shown payment in excess of $1,877.50, and the excess would represent March payment, but there are $1,877.50 relating to February utility payments.

However, I find myself in the somewhat awkward position that I haven't examined personally many of the items of debt here. Since I haven't examined those utility bills, we are not willing to rely on those solely for our proof as to this matter.

But I am willing to stipulate they go into evidence for whatever weight they have, and if we feel it necessary that we be allowed to introduce other evidence on that subject.

Mr. Enright: I will stipulate they go into evidence, that is, the memorandum and the bills you have there.

Mr. Powsner: I am speaking of the utility bills.

Mr. Enright: The five utility bills for the five apartment houses.

Mr. Powsner: That is right.

The Court: Does that stipulation include the proposition that Mrs. Tidwell paid those bills out of her personal funds?

Mr. Enright: Yes."

Then, on the following page, appears Mr. Enright's statement: "O. K. now, the amount of revenue stamps, I think, is the only remaining one." [R. 790.]

Lyda Tidwell was handicapped at the pre-trial hearing by the fact that William P. Camusi, her counsel who had handled the litigation was unable to attend, and Mr. Robert Powsner, an attorney who had been practicing for one year was unfamiliar with the issues and evidence, and was required to represent Mrs. Tidwell at that hearing. [R. 775-776.] However, the fact remains that

although the stipulations may not have been in the best of form, there was no doubt as to their meaning.

Richman argues that the court did not take evidence and rendered its decision in a summary fashion. But, it has been held that if the trial court ended the trial and announced its decision in a somewhat summary manner, this matter cannot be reviewed on appeal if the party made no objection or failed to take exception thereto. (*Solomon v. Benjamin,* 75 F. 2d 564, Cert. Den. 295 U. S. 749, 79 L. Ed. 1694, 55 S. Ct. 831.)

Objections to the judgment or decree, which might have been met, if made below, are not open to review on appeal.

National Biscuit Co. v. Litsky, 22 F. 2d 939, 56 A. L. R. 853;

Asheville Const. Co. v. Southern Ry. Co., 19 F. 2d 32;

Neil Bros. Grain Co. v. Hartford Fire Ins. Co., 1 F. 2d 904.

It has been held that where judgment was excessive on the theory of recovery adopted by the trial court, it was defendant's duty to apply there for the correction of any mistake in calculation. (*Border National Bank of Eagle Pass, Tex. v. American Nat. Bank of San Francisco,* 282 Fed. 73, writ of error dismissed and certiorari denied, 260 U. S. 701, 732, 67 L. Ed. 471, 43 S. Ct. 96.)

And this rule applies to decrees in equity.

Mauro v. Rodriguez, 135 F. 2d 555.

C. Credit in Favor of Tidwell for One-half Amount of Catalytic Units.

The court found that Lyda Tidwell was entitled to one-half of the cost of the Catalytic Units paid by her, said one-half amounting to $1,300.00. [R. 195.] The court indicated in its memorandum decision that the units

> "were acquired by the Receiver during the period of his receivership but in doing so, he merely carried out a plan which had been put in motion by defendant. These units were assets of the trust which, under the terms of the letter agreement, were sold to plaintiff. The obligation to pay is the obligation of the Receiver, as the Receiver incurred the expenses during the administration of his Trust and plaintiff was not a party to the purchase." [R. 185.]

The reasoning of the trial court is certainly sound in this respect. The letter offer does not specifically cover this item, it would be a fair interpretation that Richman and Tidwell each pay one-half the cost.

Richman had originally contracted for installation of so-called Oxyaire or Catalytic Units at the Oliver Cromwell and Canterbury Apartments. However, only the contract for the installation of the Catalytic Unit at the Canterbury Apartments was placed in evidence. [R. 801-803.] This contract was accepted by Mr. Richman as agent for the Trust on October 23, 1953, some 38 days before he was relieved of the management of the Trust by the receiver. The cost of these units became an obligation of the Trust at the time they were ordered by Richman, actually. Then the contracts were confirmed by the receiver and the receiver ordered the contractor to proceed with the work. [R. 646.]

The Catalytic Units were actually installed during the receiver's tenure of office. [R. 88.] The testimony taken during the hearing questioning the receiver's stewardship is replete with evidence covering the Catalytic Units. Richman attempted to prove, and did argue, that the receiver was negligent in the handling of the same. The receiver apparently retained the approved plans for the Catalytic Units on December 7 or 8 when they were sent to him by Mr. Richman [R. 648], and the receiver did not send them to the contractor for installation purposes until January 22, 1954. [R. 646.] Apparently, the contractor could have installed the equipment in December, 1953, but when he finally received the plans late in February, he was then short of certain strategic materials. [R. 703-704.]

Apparently, considerable delay was involved because warning was given by the Air Pollution District on January 13th concerning excessive discharge of smoke. [R. 708, 711.] A criminal complaint was then filed against Mr. Richman charging him with a violation of the Health and Safety Code of the State of California [R. 544] and requiring that he attend a hearing on February 1, 1955. [R. 637.]

Although the Air Pollution District had given approval for installation not later than December 10, 1954 [R. 387-388], the installation was not ordered until February 8, 1954. [R. 548.] There is also evidence that one Harrison, Richman's former bookkeeper, who had been retained by the receiver [R. 405-406], gave orders to the contractor not to install the equipment [R. 641] Richman claims that the receiver's attorney had erroneously advised the receiver that he was not bound by the contracts to install the Catalytic Units [R. 641], however, Mr.

Whyte, attorney for the receiver, testified that he advised the receiver that the contracts were valid and binding and should be carried out. [R. 556-557.]

Mr. Richman urges that the Catalytic Units for the two apartment houses were granted permits for their operation on March 9, 1954, and June 2, 1954, respectively [R. 805] and that the obligation to pay for them under the contracts did not arise until the said permits were granted, and that they were, therefore, obligations arising after February 28, 1954. However, only the contract with respect to the Canterbury Apartments was placed in evidence. [R. 801-803.]

The court found that the Catalytic Units were an obligation of the receiver. This was a finding of fact as well as a conclusion of law. There was more than sufficient evidence to support this finding and unless clearly erroneous, it is not subject to reversal on appeal.

> *United States v. United States Gypsum Co.,* 333 U. S. 364, 394-395, 68 S. Ct. 525, 92 L. Ed. 746.

D. Failure of Trial Court to Surcharge Tidwell for Rents of February 26, 27, and 28, 1954, Not Error.

The court found that Richman was not entitled to credit for any rents collected by Mrs. Tidwell. [R. 196.] This refers to the rents which were collected on February 26, 27, and 28, 1954, by the apartment house managers and turned over to Mrs. Tidwell at 5 p. m. on February 28, 1954.

It is important to note that the parties signed a stipulation on Friday, February 26, 1954 [R. 54-55] and that, by the terms thereof, the Receiver was to turn over all assets to Lyda Tidwell with the exception of "money in

bank and now under the control of the receiver," and, again, the stipulation states: "excepting funds in bank and under the control of said receiver."

These phrases were interpreted by the receiver and his attorney to mean that he was only to keep money in any bank account under his control. [R. 759.] Richman argues that the phrase in question means "money in bank *or* under the control of the receiver." However, the phrase appears twice in the stipulation and in both cases the phrase appears in the conjunctive and not the disjunctive. The phrase also appears twice in the order of court of February 26, 1954, and is identically written both times as "money in bank and under the control of the receiver." [R. 56.]

It should be noted that the receiver did not receive personal notice of the termination of his stewardship until Friday evening, February 26. [R. 418.] The receiver, of course, did not know what or how much rent money was paid by the tenants on February 26, 27 and 28, 1954. [R. 415.] The receiver testified that the Western Arms and the Canterbury Apartments house managers preferred to make collections on week ends and these were deposited the following week. [R. 758.] In this particular instance, these questioned rents could not be deposited until Monday, March 1, 1954. The finding that Mrs. Tidwell is entitled to keep these funds as her personal funds can be supported on several theories. The court in its Memorandum Decision points out that the letter agreement of the parties was to the effect that Mrs. Tidwell was to purchase Mr. Richman's "undivided half interest in the assets of the Richman Trust," and "If Mrs. Tidwell collected monies which were assets of the Richman Trust, then she has received no more than what she purchased."

[R. 184-185.] The court also states, "It appears that the various rents collected belong to plaintiff because they were rentals which were being paid in advance for occupancy during the term of her ownership of the properties."

These questioned rentals total $1,290.59. [R. 782.] But counsel for Mrs. Tidwell argued that if Mr. Richman wished to claim one-half of those rents, then Mrs. Tidwell could claim that she should receive credit in the sum of $4,499.29, which were rentals for the month of March, 1954, but which rentals were collected in February, 1954, by the receiver. [R. 790.] The receiver accounted for these rentals, and Mr. Richman has thus benefited, since they are a part of the balance remaining in the receiver's hands. Mr. Enright argued at the pre-trial hearing that if the court ruled as a matter of law that rents should not be pro rated, then it would be unnecessary to take evidence on the amount of March rents which Mrs. Tidwell claimed was collected by the receiver in February, 1954. The court said it would examine the evidence on that issue and that the matter could be argued by counsel at the following hearing to be set for oral argument [R. 810-812], and that the court's ruling might foreclose the taking of evidence on that issue. [R. 815.] The court, in effect, ruled that Mrs. Tidwell was not entitled to a credit for the March rents actually collected and deposited by the receiver in February. [Order *in re* Settlement, R. 190, 196.]

If this matter need be retried, Mrs. Tidwell would be entitled to a ruling as to whether she herself has a right to all the March rents collected in February by the receiver. If she has sole rights to such items, then a further accounting is necessary to introduce evidence on that issue.

E. Trial Court Did Not Err in Holding Mrs. Tidwell Entitled to Petty Cash Fund.

The court found that Mr. Richman was not entitled to any part of the petty cash fund of which Mrs. Tidwell assumed possession on February 28, 1954. The stipulation and order of the court, both of February 26, 1954, as discussed in subparagraph D above, clearly show the intent of the parties that Mrs. Tidwell was to assume possession of the petty cash fund. This petty cash fund was in existence when the receiver assumed his stewardship. The receiver's schedule of receipts and disbursements reflect a petty cash fund in the amount of $785.00 as of November 30, 1953. [R. 104.] Clearly, the petty cash fund was an asset of the Richman Trust.

In its Memorandum Decision, the trial court reasoned that Mrs. Tidwell had *"purchased all of defendant Richman's interest in that Trust and that includes the petty cash fund which existed simply as an operating incident of each individual apartment house."* [R. 185.] Mr. Richman states no good reason why Mrs. Tidwell is not entitled to the petty cash fund.

III.

Specification of Error 8—Accounting.

Under Specification of Error 8, on page 66 of Mr. Richman's Opening Brief, he apparently also makes certain other claims against Mrs. Tidwell as follows:

A. Compensation Insurance Refund.

Richman argues that he is entitled to a credit for $158.00 compensation insurance refund which was due the Trust at the time the receiver surrendered possession of the assets to Mrs. Tidwell. But here again any such refund was an asset of the trust and the whole interest in the same passed to Mrs. Tidwell when he sold his one-half undivided interest to Mrs. Tidwell. Apparently, Mr. Richman wants to pro rate when it involves a credit item now in the possession of Mrs. Tidwell, but he does not want to pro rate any of the operating obligations which were incurred prior to March 1, 1954, in those cases where the receiver failed to pay for the same and Mrs. Tidwell was thereafter forced to pay those costs in full from her own separate funds.

All the arguments hereinabove advanced with respect to the petty cash fund also apply here.

B. Richman's Fee of 10% as Agent for November, 1953.

Mr. Richman claims he is entitled to his full ten per cent (10%) fee (based on gross receipts) for the month of November, 1953. Lyda Tidwell has already discussed the issue of this fee under paragraph I of her argument in the cross-appellant's portion of this brief. Reference is made

to said argument and the same is incorporated by reference herein at this point.

Suffice it to say here that *Richman had released Mrs. Tidwell of any and all claims* which he had against her. Further than that, his letter offer of February 19, 1954, provided that *each* was to bear his own expenses. It would be manifest injustice to permit him to collect a fee for services rendered after the parties had executed mutual releases in each other's favor.

C. Mistake in Mathematical Computation of Order In Re Settlement of Receiver's Account, Fees and Distribution of Funds in Hands of Receiver.

Mr. Richman points out at pages 58 and 59 of his Opening Brief that the mathematical computation of the court's order is incorrect with respect to the credit awarded him because of the receiver's payment of the March mortgage payment. It is true that the computation was incorrectly made to his disadvantage. *However,* he does *not* point out that the *same* mistake was made with respect to the credits to which Mrs. Tidwell is entitled. The result of these errors, which were committed by the writer in the preparation of the order, was to award Mrs. Tidwell $1,340.49 *less* than the sum to which she was entitled. Conversely, Richman was awarded that same amount in excess of the sum to which he was justly entitled.

At this writing, counsel for Lyda Tidwell are in process of seeking a correction of the court's order under Rule 60(a) of the Federal Rules of Civil Procedure.

Conclusion.

It is respectfully submitted that for the reasons hereinabove stated, the order of the court settling the Account of the receiver, awarding fees, and distributing the balance of funds is substantially correct and should be affirmed with the exception that the mathematical errors committed therein should be corrected by leave of this court, and appellant Richman should be denied any credit whatsoever for management fees, and cross-appellant, Lyda Tidwell, should be allowed a credit for the escrow costs and charges properly chargeable to appellant Richman as the seller, but which were, in fact, paid by Mrs. Tidwell from her own personal funds.

Respectfully submitted,

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